Supreme Court, U.S.
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No. 96-308

In The

Supreme Court of the United States

October Term, 1995

LOYAL AMERICAN LIFE INSURANCE COMPANY, INC.,

Petitioner,

v.

SUE M. MATTIACE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Sue M. Mattiace, respectfully submits this brief in opposition to the petition of Loyal American Life Insurance Company, Inc. for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

STATEMENT OF THE CASE

The petition filed in this Court raises only one question. Loyal American Life Insurance Company contends that when the Alabama Supreme Court recognized the tort of bad faith, it violated that insurer's right to trial by jury by the recognition of this tort at a time after the Constitution of the State of Alabama recognized the right to trial by jury. No attack is made regarding the legal resolution of this particular case through the jury trial in circuit court and the affirmance of a judgment in favor of the petitioner by the Alabama Supreme Court. Indeed, the petition states that "The facts at issue in the underlying dispute are not material to the constitutional issue presented herein." (Petitioner's Brief at p. 6)

REASON FOR DENYING THE WRIT

1. The recognition of the tort of bad faith as a common law remedy is a valid remedy which has no constitutional infirmity that violates the petitioner's right to equal protection.

The Alabama Supreme Court recognized the intentional tort of bad faith in first party insurance actions in *Chavers v. National Security Fire & Casualty Company,* 405 So.2d 1 (Ala. 1981). The Court relied upon similar recognition made in other states with particular emphasis on the State of Wisconsin's decision in *Anderson v. Continental Insurance Company,* 85 Wis.2d 675, 271 N.W.2d 368 (1978). (The Wisconsin law was reviewed by this Court in *Allis-Chalmers Corp. v. Luek,* 471 U.S. 200, 105 S.Ct. 1904 (1985).) The elements of this tort were further clarified by the Alabama Supreme Court in *National Security Fire & Casualty Company v. Bowen,* 417 So.2d 179 (Ala. 1982) where the following elements were enunciated:

> A.) An insurance contract between the parties and a breach thereof by the defendant;
>
> B.) An intentional refusal to pay the insured's claim;
>
> C.) The absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> D.) The insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> E.) If intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

This tort finds its genesis in contract law requiring good faith regarding the common purpose and consistency with the justified expectations of the parties to the contract. (Restatement (Second) of Contracts §205)

Petitioner makes a direct attack on the very foundation of the common law. Petitioner contends that the recognition of this action violates its right to trial by jury as guaranteed by the Alabama Constitution. Petitioner argues that this right to trial by jury was "frozen" in Section 11 of the Alabama Constitution as that right existed in 1901 when the present Constitution was ratified. (Petitioner's Brief at p. 11) This argument is simply stated as asserting that since this tort of bad faith was recognized by the Alabama Supreme Court in 1981, it was an invalid encroachment on the "frozen" right to trial by jury as established in the Alabama Constitution in 1901. Therefore, the argument maintains that the very breath of the common law and its evolutionary basis was "frozen" by the Alabama Constitution in 1901 and this basic doctrine of American and Alabama jurisprudence has been paralyzed.

The proposition set forth by Petitioner ignores the very nature of the common law. The essence of the common law is its "inherent capacity . . . for growth and change." 15A Am.Jur.2d *Common Law* §3 (1976) The Alabama Supreme Court has recognized and embraced the capacity of the common law to adopt to changing needs of society. The Court observed in *Woodmen of the World Life Insurance Society v. Guyton*, 239 Ala. 216, 194 So. 655 (1940):

> "[T]he common law is not static, but is constantly undergoing change, and extension, to meet changing conditions due to the ever expanding business and social fabric." (*Id.*, 239 Ala. at 220, 194 So. at 658)

The Court also noted in *Swartz v. United States Steel Corporation*, 293 Ala. 439, 304 So.2d 881 (1974):

> "The common law is decisional law. It is not *frozen* into unchangeable tables of stone." (*Id.*, 293 Ala. at 442) (emphasis added)

The Court also stated in *Buchanan v. Merger Enterprises, Inc.*, 463 So.2d 121 (Ala. 1984):

> "Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose. If this were not so, we must succumb to a rule that a judge should let others "long dead and unaware of the problems of the age in which he lives do his thinking for him." (*Id.*, 463 So.2d at 127 (quoting Mr. Justice Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949)

The Alabama Supreme Court, like its sister state courts, has recognized many causes of action at the common law since the Alabama Constitution of 1901. A wife's cause of action for loss of consortium was recognized in *Swartz v. United States Steel Corporation*, 293 Ala. 439, 304 So.2d 881 (1974). Other judicially recognized causes of action such

as the Alabama Extended Manufacturer's Liability Doctrine and *bad faith* failure to pay an insurance claim were recently cited as examples of recognized causes of action that "are part of the warp and woof of the common law." *Henderson v. Alabama Power Company*, 627 So.2d 878, 385 (Ala. 1993) The Texas Supreme Court noted in 1987 that twenty-nine (29) states had judicially recognized a common law action against purveyors of alcohol for injuries caused by an intoxicated customer – including the State of Alabama. (See *El Chico Corporation v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987) The *El Chico* Court noted:

> "As demonstrated by the actions of the majority of states, the common law is not *frozen* or stagnant, but evolving, and it is the duty of this court to recognize the evolution." (*Id.*, 732 S.W.2d at 310) (emphasis added)

Petitioner's argument that the common law must be "frozen" into the calendar year 1901 is not only specious but dangerous when taken to its logical limits. This "freezing" would eviscerate the very nature of the common law. This "freezing" would ignore the changes and growth that have occurred in the insurance industry since that time. It would ignore the changes in the fabric of business and society that the common law was intended to be able to respond to in the natural evolution of our society.

Petitioner argues that equal protection of the law mandates a decision that Alabama's bad faith law violates this insurer's guaranteed right to trial by jury as set forth in Section 11 of the Alabama Constitution. (Petitioner's Brief at p. 13) The Alabama Supreme Court wrote

a lengthy and exhaustive opinion in this case. (See appendix of Petitioner's Brief for the full text of the opinion.) The Court affirmed the verdict of the jury and subsequent denial of Petitioner's Motion for J.N.O.V. based on the jury's award of $57,500.00 compensatory damages and $75,000.00 in punitive damages. The Alabama Supreme Court made a detailed analysis of the bad faith conduct of the Petitioner that was confirmed by the evidence presented at trial. The Court recited the observations by the trial judge that the Petitioner's conduct was "akin to the old carnival trial of which shell is the pea under?" (Opinion in Petitioner's Brief at p. 15A) The Alabama Supreme Court further observed that it could not condone the actions of this Petitioner in "creating" uncertain standards as it had in this case to enable it to avoid payment of a valid claim. (Opinion in Petitioner's Brief at p. 17A) The Court also addressed the Petitioner's argument that the recognition of the bad faith cause of action violated its "frozen" rights to a jury trial. The Court stated that this argument was flawed because it confused the right to a trial with the right to a trial by jury. (Opinion in Petitioner's Brief at p. 19A) The Court observed that this attack would also question that Court's recognition of a list of other common law remedies that had been recognized since the Constitution of 1901, including the following:

1.) Tortious interference with business relations.

2.) The Alabama Extended Manufacturer's Liability Doctrine.

3.) Outrageous Conduct. (See Opinion in Petitioner's Brief at p. 18A)

The Court concluded by holding there had been no violation of the Petitioner's right to trial by jury nor any violation of its Equal Protection guarantees. (Opinion in Petitioner's Brief at p. 20A) No application for Rehearing was filed by Petitioner and the records do not reflect any notification of the Attorney General of the State of Alabama regarding an assertion that this case is unconstitutional.

CONCLUSION

The direct attack made by Petitioner on the principles of common law is so broad yet so unfounded as to make it difficult to address. It is an argument conducted in a mist or fog of particles of misconstrued quotes that have no substance. The Alabama Supreme Court acted responsibly and properly in its recognition of the tort of bad faith. Our principles of federalism, state's rights and the common law itself support this action. There is no constitutional infirmity in the recognition of this common law remedy. Indeed, this Court reviewed Alabama's common law fraud remedies in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991) This Court noted in *Haslip* that it could not say that Alabama's common law rule providing for the recovery of punitive damages in the insurance context did not rationally advance the state's interests in minimizing fraud. (*Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 at 15.) This Court noted the traditional common law approach for assessing punitive awards has long been approved and cited *Day v. Woodworth*, 13 How. 363, 14 L.Ed. 181 (1852) (See *Haslip*, supra, 499 U.S. 1, 15). The

Alabama Supreme Court has noted that bad faith is a species of fraud. *Chavers v. National Security Fire & Casualty Company*, 405 So.2d 1 (Ala. 1981) Therefore, this initial recognition was tied to the evolution of actions for fraud.

Respondent urges this Court to recognize the inherent common law propriety of Alabama's recognition of the tort of bad faith and to refuse the petition filed herein.

Respectfully submitted,

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